Supreme Court, U.S.
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No. 96-40

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALBERTO SAN PEDRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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82 pp

QUESTION PRESENTED

Whether a United States Attorney's Office may bind the Immigration and Naturalization Service not to deport a criminal alien even though the Attorney General has not delegated to United States Attorney's Offices the actual authority to do so.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 79 F.3d 1065. The opinions of the district court (Pet. App. 33-44, 45-56) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1996. The petition for a writ of certiorari was filed on July 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Cuba who has been a lawful permanent resident of the United States since

May 2, 1956. Pet. App. 2. In October 1988, a federal grand jury in the Southern District of Florida returned a three-count indictment against petitioner, charging him with two counts of bribery and one count of conspiracy to commit bribery. *Id.* at 45-46. In July 1989, petitioner entered into a plea agreement with the United States Attorney's Office for the Southern District of Florida. *Id.* at 46. As part of that plea agreement, petitioner agreed to plead guilty to conspiracy to commit bribery. The United States agreed to drop the two bribery counts and not to prosecute petitioner "for any other offenses based upon any evidence revealed in the investigation that led to the indictment" or information of which the government "was then aware or could be aware in the exercise of due diligence." *Ibid.*[1] On July 12, 1989, petitioner was convicted of conspiracy to commit bribery on his plea of guilty, and on September 28, 1989, was sentenced to 30 months in prison, with credit for time served. *United States* v. *San Pedro*, 781 F. Supp. 761, 764-765 (S.D. Fla. 1991).

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[1] The plea agreement provided, in pertinent part, that:

> The United States, in consideration of the defendant's compliance with the terms and conditions of this Plea Agreement, agrees not to prosecute [petitioner] for any other offenses based upon any evidence revealed in the investigation that led to the charges in the subject indictment. In addition, the United States agrees not to prosecute [petitioner] based upon any other evidence of which it is now aware or which, with the exercise of reasonable diligence, it could presently become aware through communication with state or local enforcement personnel.

Pet. App. 46 n.1.

2. In December 1989, the Immigration and Naturalization Service (INS) issued an Order to Show Cause, charging petitioner with deportability based upon two prior state convictions. C.A. R.E. Doc. 1, Exh. 3.[2] In November 1992, INS formally instituted deportation proceedings against petitioner. Petitioner then filed in the United States District Court for the Southern District of Florida a petition for writ of mandamus or prohibition and temporary restraining order, contending that the institution of deportation proceedings by the INS violated the plea agreement into which he had entered with the government. Petitioner alleged that the agreement itself prohibited the government from undertaking deportation proceedings and that the government should be estopped from deporting him because of representations allegedly made by officials from the United States Attorney's Office during the plea negotiations that petitioner would not be deported if he agreed to plead guilty to the conspiracy charge. Pet. App. 47.

In motions to dismiss and for summary judgment, the government argued that petitioner was never promised that he would not be deported, and that even if he was, the United States Attorney's Office lacked the authority to promise not to deport petitioner because such authority has not been delegated to the United States Attorney in the Immigration and Na-

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[2] In October 1971, petitioner was convicted in Florida state court of conspiracy to commit murder in the first degree and carrying a concealed firearm. C.A. R.E. Doc. 1, Exh. 3. In May 1988, he was convicted in Florida on state charges of six counts of unlawful compensation and one count of conspiracy to traffic in cocaine. *Ibid.*

tionality Act (INA), 8 U.S.C. 1101 *et seq.*, or applicable Department of Justice regulations. Pet. App. 47-51.

The district court determined that a dispute existed whether the government made the promise not to deport petitioner in the plea negotiations, but concluded that nothing in the United States Attorneys' Manual (USAM) or INA gave the United States Attorney the authority to bind the INS with respect to a promise not to deport. Accordingly, the district court entered summary judgment for the government. Pet. App. 4, 55.

3. The court of appeals affirmed. Pet. App. 1-15.[3] For purposes of its decision, the court assumed that petitioner had been promised nondeportation. The court then held that the United States Attorney's Office lacked the actual authority to make the promise. *Id.* at 6, 9. Citing 8 U.S.C. 1103(a) and (b), the court held that Congress has placed sole authority to enforce the immigration laws, including the power to deport criminal aliens, with the Attorney General. Pet. App. 9. The court concluded that, because the Attorney General has not clearly and explicitly delegated that authority to United States Attorneys, a United States Attorney or an Assistant United States Attorney cannot preclude the INS from initiating a deportation proceeding against a criminal alien. *Id.* at 14.

Senior District Judge Goettel, sitting by designation, dissented. He reasoned that the issue was

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[3] The court of appeals noted that petitioner was not seeking to vacate his guilty plea for the conspiracy charge, but rather was seeking only enforcement of the purported promise not to deport him. Pet. App. 5. Accordingly, the petition for a writ of certiorari does not raise an issue with respect to petitioner's conviction for conspiracy.

"whether there has been a violation of [petitioner]'s fundamental right to due process if, in fact, the government reneged on a prosecutorial promise made as part of San Pedro's plea agreement." Pet. App. 15. He nonetheless agreed with the majority that "[c]learly the United States Attorney's Office did not have the express authority to promise a criminal defendant that he would not be deported as part of a plea bargain." *Id.* at 30. He believed, however, that the case should be remanded to the district court for further fact-finding on the issue whether a promise not to deport had actually been made by the United States Attorney's Office. *Id.* at 32.

ARGUMENT

1. Petitioner contends (Pet. 8, 12-13) that this Court's review is warranted to resolve a conflict among the courts of appeals over whether a United States Attorney's Office has authority to promise a criminal defendant that he will not be deported, and thereby bind the INS not to deport him. In light of a recent Department of Justice regulation that makes clear that United States Attorney's Offices lack the authority to bind the INS in deportation decisions without the INS's written consent, the disagreement in the circuits is unlikely to persist and does not warrant this Court's review.

a. As the court of appeals correctly ruled, Congress has "placed the responsibility of enforcing the [Immigration and Nationality Act] in the hands of the attorney general, who in turn is permitted to delegate her powers to the commissioner of the INS." Pet. App. 9 (citing 8 U.S.C. 1103(a) and (b); 8 C.F.R. 2.1; *INS* v. *Phinpathya*, 464 U.S. 183, 185 n.1 (1984)). The Attorney General has delegated to the INS Commis-

sioner and her designees the authority to initiate deportation proceedings, 8 C.F.R. 242.1(a), as well as to cancel an order to show cause why the alien should be deported, 8 C.F.R. 242.7. These delegations vest no authority in a United States Attorney either to initiate or to terminate a deportation proceeding.

b. Petitioner asserts (Pet. 12) that a United States Attorney nonetheless has the power to bind the INS in its deportation proceedings through a promise made during plea negotiations over a criminal charge. The court of appeals correctly rejected that argument. For purposes of the case, the court assumed that a promise in fact had been made, although the court acknowledged that a factual dispute existed as to that issue. The court then applied longstanding principles that the government agent must have the authority to make the promise before it can be enforced against the government. Pet. App. 5-6 (citing *United States* v. *Kettering*, 861 F.2d 675, 677 (11th Cir. 1988)). "Estoppel and apparent authority normally will not substitute for actual authority to bind the United States government." Pet. App. 6 (quoting *Thomas* v. *INS*, 35 F.3d 1332, 1338 (9th Cir. 1994)). See also *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917) ("[T]he United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

The court concluded that the United States Attorney lacked actual authority to make a promise that petitioner would not be deported because the United States Attorney had not been delegated authority by the Attorney General either to deport or to bind the INS with respect to deportation. The guidance provided in the USAM did not "contain an explicit, affirmative delegation to U.S. Attorneys and AUSAs of the Attorney General's authority to promise nondeportation." Pet. App. 13.[4] Indeed, as the court

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[4] As the court below found, "[t]he parties dispute whether such a delegation has been made [by the Attorney General to the United States Attorneys], but they agree the only possible sources of delegation are §§ 9-16.020 and 9-73.510 of the USAM." Pet. App. 10 (footnotes omitted). Section 9-16.020 provides as follows:

> U.S. Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No U.S. Attorney or AUSA has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or AUSAs, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

Section 9-73.510 provides as follows:

> In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

Pet. App. 10 nn.4 & 5. As petitioner concedes (Pet. 6), the INS issued its deportation order *after* the plea agreement was consummated. Consequently the approval provision in Section 9-16.020 is inapplicable, because the deportation action was not

found, the USAM "expressly *limit[s]* the authority of U.S. Attorneys and AUSAs to make such promises." *Ibid.* Absent the actual authority to make a promise not to deport petitioner, "the agreement is unenforceable." *Id.* at 5 (quoting *Kettering*, 861 F.2d at 677).

2. Petitioner correctly notes (Pet. 8) that courts of appeals have reached conflicting results on the question whether United States Attorney's Offices may bind the INS on immigration matters. Compare *Thomas* v. *INS*, 35 F.3d 1332 (9th Cir. 1994) (may bind INS), and *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994) (same), with Pet. App. 6-9 (may not bind INS). That conflict, however, has been ameliorated by a recent change in the Department of Justice regulations, and therefore does not warrant further review by this Court.

a. In *Thomas*, the Ninth Circuit's analysis turned on the actual authority of the United States Attorney to make a plea agreement that would bind the INS not to deport an individual. Absent such authority, the court acknowledged the unenforceability of a promise by a United States Attorney that the INS would not initiate deportation proceedings. 35 F.3d at 1338. After finding "no express grant of authority to United States Attorneys to bind the 'government' not to oppose motions for relief from deportation to the INS," *id.* at 1339, the court nonetheless concluded that such authority in United States Attorney's

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"pending or completed" when the promise was alleged to have been made. Nor is there any indication in the record that the Criminal Division gave prior authorization for any alleged agreement by the United States Attorney not to deport petitioner, thus making a possible delegation of authority pursuant to Section 9-73.510 inapplicable in this case.

Offices should be found to be implied from the general power of United States Attorneys to make agreements pursuant to their authority to "prosecute for all offenses against the United States," *ibid.*, citing 28 U.S.C. 547(1).

The *Thomas* court expressly invited the Attorney General to clarify through regulation when a United States Attorney may promise in a plea agreement that the government will not deport a defendant:

> If the Attorney General wished to limit the incidental authority of United States Attorneys in this respect, she could easily do so with a section in the Code of Federal Regulations, but she has not chosen to do that. As a matter of administrative prudence the Department of Justice might wish to have some internal coordinating procedure for agreements by United States Attorneys which affect the Immigration and Naturalization Service.

Thomas, 35 F.3d at 1341.

b. Similarly, in *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994), the court addressed whether an explicit written plea agreement by the United States Attorney that "the United States will recommend against deportation," *id.* at 348, could bind the INS in a subsequent deportation proceeding. The Eighth Circuit in *Margalli-Olvera* stated that it was following the Ninth Circuit in *Thomas*, and acknowledged that such a written, express agreement would be unenforceable if the United States Attorney lacked the actual authority to make the promise. *Id.* at 353. But the *Margalli-Olvera* court agreed with the Ninth Circuit that "an Assistant United States Attorney has actual authority to bind the INS" by virtue of the

delegation given to prosecute offenses against the United States absent any restriction on that authority by the Attorney General. *Id.* at 354.

c. To resolve the uncertainty created by the *Thomas* and *Margalli-Olvera* decisions, the Attorney General has recently issued new regulations codifying the United States' position that federal prosecutors, law enforcement agencies, and other officials must "obtain written consent" from the INS "when entering into a plea agreement, cooperation agreement, or similar agreement promising an alien favorable treatment * * * under the immigration laws." 61 Fed. Reg. 48,405 (Sept. 13, 1996).[5] The rule provides as follows:

> The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and the necessary authorization must be in writing to be effective, and the authorization shall be attached to the agreement.

App., *infra*, 5a.

By clarifying that the United States Attorneys lack authority to bind the INS, the new regulation

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[5] The new regulation is set out in full in App., *infra*, 1a-5a. The interim rule is effective October 15, 1996, with written comments to be submitted on or before November 12, 1996. *Id.* at 1a.

eliminates the basis of the court of appeals' rulings that were in conflict with the decision by the court below. Both the Ninth Circuit in *Thomas* and the Eighth Circuit in *Margalli-Olvera* inferred actual authority absent a clear statement in the Department of Justice regulations delineating when a promise by a United States Attorney may properly bind the INS in a deportation proceeding. Those two circuits have not had an opportunity to reassess the continuing validity of *Thomas* and *Margalli-Olvera* in light of the new regulations, and it is doubtful that those courts would now conclude that United States Attorneys have actual authority to bind the INS with respect to deportation orders. Accordingly, the circuit conflict cited by petitioner is likely to disappear and does not at present warrant this Court's review.

3. Petitioner's argument that the United States violated his right to constitutional due process does not warrant this Court's review. First, the cases upon which he relies do not support his claim. In *Santobello* v. *New York*, 404 U.S. 257, 258 (1971), the defendant entered into a plea agreement that obligated the government to remain silent when asked if it had a sentence recommendation. The promise made by the prosecutor was squarely within his actual authority. In *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), the Court held that due process required a prosecutor to reveal to a defendant a promise not to prosecute the government's chief witness in return for the witness's truthful testimony. Contrary to petitioner's assertion (Pet. 10-11), *Santobello* and *Giglio* do not stand for the proposition that the Due Process Clause requires the specific performance of *any* promise made by a prosecutor, regardless of whether the prosecutor had actual authority to make

the promise. Petitioner cites no case that holds that the United States may be bound by a promise made outside the agent's authority. Accordingly, his due process challenge was correctly rejected by the court below and does not warrant further review by this Court.[6]

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[6] This case is also unworthy of review by this Court because there was no promise by the United States Attorney's Office that the government would not deport petitioner. Neither the court of appeals nor the district court made the fact-findings necessary to support petitioner's claim because of their conclusion that any alleged promise would have been unenforceable for lack of actual authority. Petitioner claims that during the plea negotiations pursuant to his 1988 federal indictment, the United States government orally promised him that he would not be deported as a result of his conviction.

That allegation is directly contradicted by admissions in two other cases, in which petitioner represented that "[a]lthough it was not reflected in the plea agreement, the government had agreed to *recommend* that he not be deported as a result of his conviction." C.A. R.E. Doc. 53, Exh. A, at 11, Exh. B, at 6-7 (emphasis supplied). Additionally, petitioner's former counsel testified at a hearing on July 15, 1991, before the magistrate judge that the United States Attorney's Office agreed only to write a letter to the INS asking it to consider petitioner's cooperation and recommending that he not be deported. C.A. R.E. Doc. 53, Exh. D. Finally, in September 1990, petitioner's counsel wrote a letter to an Assistant United States Attorney regarding petitioner's immigration status. C.A. R.E. Doc. 53, Exh. E. In that letter, she detailed the plea negotiations, highlighting the fact that the United States Attorney's Office refused to place a "no deportation" clause in the plea agreement because the United States Attorney's Office had no authority to bind the INS. *Ibid.*

Thus, at most the government agreed only to make a recommendation against deportation, and the United States Attorney's Office fulfilled that promise. The office recommended to the INS that it favorably consider petitioner's cooperation in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1996

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deciding whether or not to continue deportation proceedings. C.A. R.E. Doc. 53, Exh. C. The statements in the motions filed by petitioner's counsel that the government agreed to *recommend* that he not be deported are admissions that no *promise* was made by the government that he would not be deported. See *Camacho-Bordes* v. *INS*, 33 F.3d 26, 28 (8th Cir. 1994) (government agreement to recommend against deportation does not bind INS from deporting criminal alien).

APPENDIX

61 Fed. Reg. 48,405 (Sept. 13, 1996) provides:

Rules and Regulations

* * * * *

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

28 CFR Part 0

[INS No. 1791-96; AG Order No. 2055-96]

RIN 1115-AE50

Agreements Promising Non-Deportation or Other Immigration Benefits

AGENCY: Department of Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule requires Federal prosecutors, law enforcement agencies, and other officials to obtain written consent from the Immigration and Naturalization Service (Service) when entering into a plea agreement, cooperation agreement, or similar agreement promising an alien favorable treatment by the Service. This rule ensures that favorable treatment under the immigration laws is extended only after a full consideration of its effect on overall immigration enforcement, alleviates confusion over the authority to enforce the immigration laws, and prevents the Service from being bound by agreements undertaken without its knowledge and

approval. The rule codifies a long-standing position of the Department of Justice.

DATES: This interim rule is effective October 15, 1996. Written comments must be submitted on or before November 12, 1996.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 "I" Street NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1791-96 on all correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT:

Brad Glassman, Office of the General Counsel, Immigration and Naturalization Service, 425 "I" Street NW., Room 6100, Washington, DC 20536, telephone (202) 514-2895.

SUPPLEMENTARY INFORMATION: Considerable uncertainty has arisen as to whether plea agreements, cooperation agreements, and other agreements undertaken by agencies other than the Immigration and Naturalization Service (Service) may bind the Service in the exercise of its authority under the immigration laws. The Supreme Court has held that "anyone entering into an agreement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). Accordingly, the Eleventh Circuit has

held that "officials at the INS may initiate deportation proceedings against a particular defendant without considering whether (a) * * * U.S. Attorney has promised the defendant non-deportation as part of a plea agreement." *San Pedro* v. *United States*, 79 F.3d 1065, 1071 (11th Cir. 1996).

However, two United States Courts of Appeals have taken a different view, relying on common law agency principles to enforce a plea agreement and a cooperation agreement against the Service. *Margalli-Olvera* v. *INS*, 43 F.3d 345 (8th Cir. 1994) (plea agreement); *Thomas* v. *INS*, 35 F.3d 1332 (9th Cir. 1994) (cooperation agreement). This rule will clarify which components within the Department of Justice have authority to bind the Department in matters concerning the immigration laws. The consent requirement ensures that favorable treatment under the immigration laws is extended only after a full consideration of its effect on overall immigration enforcement, preserves the authority of the Service to enforce the immigration laws, and prevents the Service from being bound by agreements undertaken without its knowledge and approval. *Cf. Thomas*, 35 F.3d at 1341 ("If the Attorney General wished to limit the incidental authority of United States Attorneys [to bind the Service without its consent], she could easily do so with a section in the Code of Federal Regulations * * *."). This rule codifies a long-standing position of the Department of Justice.

The Attorney General's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based upon the exception found at 5 U.S.C. 553(b)(3)(A) for "rules of agency organization, procedure, or practice." The

Attorney General certifies, in accordance with 5 U.S.C. 605(b) (1995), that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a "significant regulatory action" within the meaning of E.O. 12866, section 3(f), and accordingly has not been reviewed by the Office of Management and Budget. This rule is not considered to have federalism implications warranting the preparation of a Federalism Assessment in accordance with E.O. 12612.

[p. 48,406]

List of Subjects in 28 CFR Part 0

Authority delegations (government agencies), Government employees, Organization and functions (government agencies), Whistleblowing.

Accordingly, part 0 of chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 0—ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for Part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519.

2. In part 0, subpart CC, a new §0.197 is added to read as follows:

§0.197 Agreements, in connection with criminal proceedings or investigations, promising non-deportation or other immigration benefits.

The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and the necessary authorization must be in writing to be effective, and the authorization shall be attached to the agreement.

Dated: September 9, 1996.

Janet Reno,

Attorney General.

[FR Doc. 96-23491 Filed 9-12-96; 8:45 am]

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